

THE INDUSTRIAL ACCIDENT COMPENSATION SYSTEM IN VICTORIA

by Gordon L. Hughes*

[The enactment of the Accident Compensation Act in 1985 was a radical and controversial piece of legislation designed to provide improved benefits and rehabilitative opportunities to workers at a low cost to employers. Since its enactment there has been a 'dual' system of compensation for industrial accidents with injuries suffered prior to 31st August, 1985, being governed by the Workers Compensation Act and injuries subsequent to that date governed by the Accident Compensation Act. The benefits conferred under the Accident Compensation Act are wider and more substantial than those previously available under the Workers Compensation Act, but the common law right to sue for damages for pecuniary and non-pecuniary loss has been restricted to a right to sue for pain and suffering and loss of enjoyment of life. In this article, Mr. Hughes discusses the sphere of operation of each Act and the effect on the common law right of action.]

A. INTRODUCTION

Since 4.00 p.m. on 31st August, 1985, Victoria has had a 'dual' accident compensation system. A worker who has sustained an injury arising out of or in the course of employment prior to that time is entitled to benefits under the Workers Compensation Act 1958 (Vic.) and, if the injury was caused by the negligence of the employer, the worker may also pursue damages at common law for pecuniary and non-pecuniary loss. An injury sustained after 4.00 p.m. on 31st August, 1985 is governed by the Accident Compensation Act 1985 (Vic.) which is broader and more generous in the provision of benefits to the worker but which restricts the ambit of a common law claim against a negligent employer.

This paper is divided into four parts. First, there is a discussion of the essential provisions of the Workers Compensation Act. Secondly, the Accident Compensation Act is examined. Thirdly, the fundamental principles of common law as they relate to suits against a negligent employer are outlined. Finally, there is reference to situations in which an injury is sustained by gradual process both before and after 4.00 p.m on 31st August, 1985.

B. WORKERS COMPENSATION ACT 1958

As stated above, injuries sustained prior to 4.00 p.m. on 31st August, 1985

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are governed by the provisions of the Workers Compensation Act.¹

(a) *Eligibility*

An employer is liable to make payments of compensation if, in any employment, personal injury arising out of or in the course of the employment is caused to a worker.²

The Act specifies that a 'worker' does not include an outworker, but otherwise means any person, including a domestic servant, who has entered into or works under a contract of service or apprenticeship or otherwise with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied and whether it is oral or in writing.³ The Act deems certain persons to be workers (for example, taxi drivers,⁴ school pupils employed under work release programmes⁵ and members of Parliament and Judges⁶) and specifically excludes other occupations (for example, outworkers⁷ and professional athletes injured in contest or in training⁸). Voluntary workers are generally not considered 'workers' unless specifically designated so by other legislation.⁹

The term 'employment' is not defined in the Act and the definition of 'employer'¹⁰ is not particularly helpful in this context. The traditional test to determine whether an employment contract exists is to distinguish between a contract *of* service, in which a person is under the direct or express control of another, and a contract *for* services, in which there is a lack of effective control to the extent that the person performing the work is more properly regarded as an 'independent contractor' and is not, therefore, in an employment situation!¹¹

With respect to the concept of an 'injury', there is no requirement that employment be a contributing factor in any sense so long as it 'arises out of or in the course of' employment. The Act extends this concept, however, to include a disease contracted by a worker in the course of employment

¹ For a discussion of the Law of Workers Compensation of Victoria, See Hill & Bingeman, *Principles of the Law of Workers Compensation*, 1981; Anderson & Rendit, *Workers Compensation Victoria* (3rd ed. Boyes & O'Loughlen) 1980; *Guide Book to Workers Compensation in Australia* (3rd ed. 1983); *Victorian Workers Compensation Practice Guide* (ed. Snowdon, Ashley, Carlisle, Twining) 1980.

² Workers Compensation Act 1958 (Vic.) s.5(1).

³ Workers Compensation Act s.3(1).

⁴ Workers Compensation Act s.3(5).

⁵ Workers Compensation Act s.3(7C).

⁶ Workers Compensation Act s.4. See also ss.3(3), 3(4), 3(6A) to 6(D), 3(7), 3A, 4(1C) and 59.

⁷ Workers Compensation Act s.3(1).

⁸ Workers Compensation Act s.3(7A).

⁹ See, Country Fire Authority Act 1958, Juries (Amendment) Act, 1961, Police Assistance Act, 1968, Volunteer Civil Defence Workers Act, 1972 and Education Volunteer Workers Compensation Act, 1975.

¹⁰ Workers Compensation Act s.3(1).

¹¹ For general discussion on this issue, see, Hill & Bingeman, *op. cit.* 11; Anderson & Rendit *op. cit.* 1422-1423; *Victorian Workers Compensation Practice Guide, op. cit.*, 1-290; Glass, McHugh & Douglas, *The Liability of Employers in Damages for Personal Injury* (2nd ed. 1979); *Australian Pay-Roll Tax Manual*, 1982, 4-040.

'whether at or away from his place of employment and to which the employment was a contributing factor and contributed to a recognisable degree' and 'the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease where the employment was a contributing factor and contributed to a recognisable degree to that recurrence, aggravation, acceleration, exacerbation or deterioration.'¹² It has been suggested that 'the question of what constitutes an "injury" is probably the most litigated question in workers' compensation law',¹³ primarily on the question of what constitutes a recurrence, aggravation, acceleration, exacerbation or deterioration and whether this has been to a 'recognisable degree'.

It should be noted that a person will be disentitled to compensation payments, even if the above criteria are met, if the injury is attributable to his or her serious and wilful misconduct, including being under the influence of intoxicating liquor, unless the resultant injury is death or serious and permanent disablement!¹⁴ Compensation is also not payable in the event of a deliberately self inflicted injury, whether or not death or serious and permanent disablement results!¹⁵ It should also be noted that the Act extends the cover of compensation, in certain circumstances, to situations where a worker has been absent from employment but engaged in a 'protected journey' (for example, travelling between his or her residence and the place of employment)¹⁶, or when the worker is outside Victoria in certain circumstances!¹⁷

(b) Types of Compensation

Compensation may be claimed in respect of the death of a worker, where a worker is suffering a total or partial incapacity for employment, where the worker is suffering a permanent disability to a specified part of the body or where medical expenses have accrued.

If a worker's death 'results from or is materially contributed to' by an injury sustained in compensable circumstances, a claim may be brought by his or her dependants. The employer becomes liable to pay a lump sum pursuant to a scale set out in the Act and the amount payable is dependent upon the date of death, the number of any dependant children and the ages of those children. Under the most recent rates, operating in respect of death occurring between 1st July and 31st August, 1985, (after which the Workers

¹² Workers Compensation Act s.3(1); *cf.* definition of 'disease'.

¹³ Anderson & Rendit *op. cit.* 1,301; *cf.* Hill & Bingeman *op. cit.* 24-45.

¹⁴ Workers Compensation Act s.6.

¹⁵ Workers Compensation Act s.6. This may not necessarily exclude a claim in respect of suicide, however, if the worker lacked the necessary mental judgment to inflict a 'deliberate' injury: Hill & Bingeman, *op. cit.* 145.

¹⁶ Workers Compensation Act s.8(2).

¹⁷ Workers Compensation Act s.7.

Compensation Act benefits are superseded by Accident Compensation Act benefits), a sole dependant of a worker is entitled to the sum of \$60,438.00 with additional amounts ranging from \$3,329.00 to \$14,743.00 in respect of each dependant child under the age of 16 years or, in the case of a full time student, under the age of 21 years.¹⁸ It will be appreciated that there has been much litigation in this field, not only on the question of whether death is related to employment but also on the question of whether a claimant is, in fact, a 'dependant'.¹⁹

Where a compensable injury results in or materially contributes to a worker being totally incapacitated for employment, a claim may be made for weekly payments of compensation for the duration of the incapacity.²⁰ The amount of the weekly sum due is dependent upon when the incapacity occurred, whether the worker had reached the age of 21 years, whether there was a dependant spouse and the number of dependant children.²¹ A worker injured between 1st July, 1985 and 31st August, 1985 is entitled to total incapacity payments of \$191.00 per week with a further sum payable for a dependant spouse of \$50.00 and \$18.00 each for dependant children up to a maximum of \$284.00 per week. The total amount of weekly payments to be received is not to exceed \$67,364.00 unless the Tribunal determines that the worker is entitled to an extension on the basis that there is a permanent disability which is either total or which is partial and of 'major degree'.²² It should be noted that total incapacity may be deemed where a worker with limited fitness has failed to find suitable employment despite reasonable attempts²³ or where an employer fails to arrange suitable employment for an injured employee 'having regard to the worker's incapacity and place of abode'.²⁴

Where a worker acknowledges or is found by the Tribunal to have a capacity for some form of employment and is not deemed to be totally incapacitated as discussed above, an order may be made for partial incapacity payments.²⁵ In these circumstances, the worker will receive a proportion of the total incapacity entitlement in the same ratio as the actual weekly loss of earnings.²⁶

A worker suffering a permanent disability to a part of the body specified in the Table of Maims will be entitled to a lump sum payment.²⁷ The Table ascribes a monetary value to the specified injuries and the worker is entitled to receive that sum or a proportion thereof, depending upon the extent of the injury. For example, a worker suffering total loss of hearing in both ears and who made a claim or ceased relevant employment between 1st July and 31st August, 1985 would be entitled to \$39,285.00. A person suffering a 10%

¹⁸ Workers Compensation Act s.9.

¹⁹ 'Dependants' are defined in s.3(1); cf. s.9, Cl. 4(a) and 4(c) and also s.9, Cl. 1(a)(iii) and (iv).

²⁰ Workers Compensation Act s.9(2).

²¹ Workers Compensation Act s.9, Cl. 1(b)(i).

²² Workers Compensation Act s.9, Cl. 1(b)(i) and (iii).

²³ Workers Compensation Act s.9, Cl. 1(b)(v).

²⁴ Workers Compensation Act s.9, Cl. 1(b)(iv).

²⁵ Workers Compensation Act s.9(2).

²⁶ Workers Compensation Act s.9, Cl. 1(b)(ii).

²⁷ Workers Compensation Act s.11(1).

binaural loss of hearing in these circumstances would be entitled to \$3,928.50. Payments pursuant to the Table essentially exclude the right of the worker to claim subsequent compensation for incapacity unless that subsequent incapacity is 'over and above what would normally be expected to result from the injury in question'.²⁸

(c) Procedure

Generally, an employer receiving a claim for compensation will forward the claim to its insurer which will make a decision as to whether liability is to be accepted or denied. Where the claim is for weekly payments, the employer (or its insurer) is required to commence making payments 'as soon as it is practicable after the commencement of the incapacity', and in any case not more than 21 days after the worker has provided a medical certificate certifying an incapacity for work and specifying the nature of the injury, together with a written claim form.²⁹ An employer (or insurer) which disputes liability in these circumstances must, within 21 days, apply to the Board for an exemption from commencing weekly payment³⁰, and an exemption will be granted by the Tribunal if it is satisfied there is a 'genuine dispute' as to whether or not the injury was caused in compensable circumstances.³¹ Penalties are provided in respect of applications for exemption brought by employers or insurers when it is known the application is 'without reasonable grounds'.

A worker aggrieved by a decision to exempt an employer from commencing weekly payments may apply to the Tribunal for a review of the order.

Once weekly payments are commenced, these are to continue until terminated, diminished or redeemed in accordance with the procedure prescribed by the Act.

Apart from circumstances where the worker dies or resumes employment, payments may only be terminated (except by order of the Tribunal) if the employer or insurer obtains a 'terminating certificate' from a medical practitioner, certifying the worker has wholly recovered from the effects of the injury or that the incapacity is no longer due wholly to the injury. However the worker has the right to provide an 'answering certificate' (within 28 days of service of the 'terminating certificate') disagreeing with the 'terminating certificate', whereupon payments are to continue.³²

A similar procedure exists in relation to the diminution of payments where a worker has allegedly substantially recovered from the effects of an injury but is not fit for unrestricted employment.

It is common for either or both parties to seek a redemption of future weekly payments. A redemption sum is to be 'of such amount as appears to the Board

²⁸ *Goold & Porter Pty. Ltd. v. Cleveland* (1961) 107 C.L.R. 129.

²⁹ Workers Compensation Act s.9, Cl. 5A.

³⁰ Workers Compensation Act s.9, Cl. 5A(2).

³¹ Workers Compensation Act s.9, Cl. 5A(4).

³² Workers Compensation Act s.9, Cl. 7(1)(c).

to be just and reasonable having regard to the probable duration of the incapacity and to such other factors as the Board thinks relevant'.³³ This procedure has an attraction to workers who find a lump sum more useful than continuing weekly payments and to employers or insurers who wish to finalise their liability in respect of a claim once and for all.

(d) Insurance

Prior to the commencement of the scheme introduced by the Accident Compensation Act, it was necessary for every employer to obtain a policy of accident insurance from an approved insurer in respect of the full amount of liability to pay compensation.³⁴ A limited form of self-insurance was permitted to the extent that an employer could opt not to be insured for the first \$500.00 of its total liability.³⁵ Full self-insurance also existed in relation to seven employers³⁶ although no new self-insurers were permitted after an amendment to the Act in 1946.³⁷ Although not involved in the new scheme, such insurers continue to be liable in respect of claims arising out of employment prior to 4.00 p.m. on 31st August, 1985 but which are brought after the termination of the policy.³⁸

C. ACCIDENT COMPENSATION ACT 1985

The Accident Compensation Act radically overhauled the pre-existing workers' compensation system. Private insurers were abolished and replaced by a central fund administered by the Accident Compensation Commission. The Workers Compensation Board was abolished and replaced by the Accident Compensation Tribunal. Broader definitions relating to eligibility were introduced, benefits were increased and a streamlined procedure was adopted. The right to seek common law damages from negligent employers was limited; the right of self-insurance was re-introduced; and the Victorian Accident Rehabilitation Council was created.

(a) Accident Compensation Commission

The Act creates the Accident Compensation Commission,³⁹ the functions of which include managing the accident compensation scheme generally⁴⁰ and administering and monitoring the central fund.⁴¹ The controversial decision to abolish private insurers in this field reflected the Government's policy that

³³ Workers Compensation Act s.9(2).

³⁴ Workers Compensation Act s.71 and 72 (now repealed).

³⁵ Workers Compensation Act s.72.

³⁶ Victorian Railways Board, Melbourne & Metropolitan Board of Works, Mobil Oil Australia Limited, Esso Australia Limited, National Commercial Banking Corporation of Aust. Limited, Westpac Banking Corporation and Colonial Mutual Life Assurance Society Limited.

³⁷ Workers Compensation Act s.33.

³⁸ Workers Compensation Act s.71A.

³⁹ Accident Compensation Act 1985 (Vic.) s.18(1).

⁴⁰ Accident Compensation Act s.19.

⁴¹ Accident Compensation Act s.20.

a central fund would create cost savings arising from centralised revenue collection and elimination of 'the costs of seeking new business, brokerage and economies of scale and claims and other administration'.⁴² The Act does, however, preserve the right of the Commission to appoint agents in the fields of claims administration, risk management and fund management⁴³ and this has enabled some approved former workers' compensation insurers to maintain an involvement in the scheme.

(b) Accident Compensation Tribunal

The Act replaces the Workers Compensation Board with the Accident Compensation Tribunal.⁴⁴ The primary function of the Tribunal is to assist in the determination of disputed claims. For this purpose it is divided into three sets of divisions — conciliation divisions, tribunal divisions and board divisions.⁴⁵

The conciliation divisions are responsible for considering all matters at a preliminary conference before they can proceed to final determination.⁴⁶ The tribunal divisions are essentially responsible for determining claims which have not proved capable of settlement at conciliation level⁴⁷ and which arise under the Accident Compensation Act, whereas the board divisions are similarly responsible for determining unsettled matters arising under the Workers Compensation Act.⁴⁸ The Act preserves a right of appeal from a decision of a tribunal division or board division to the Full Court of the Supreme Court on any question of law.⁴⁹

(c) Eligibility

The definitions of 'worker', 'employment' and 'injury', as discussed above in relation to the Workers Compensation Act, are broadened under the Accident Compensation Act.

The definition of a 'worker' no longer excludes an outworker.⁵⁰ The list of persons deemed to be 'workers' is extended to persons employed by an 'administrative unit'⁵¹ and persons injured in the course of any employment program provided by the Victorian Accident Rehabilitation Council.⁵² The coverage of ministers of religion is also expanded.⁵³

The concept of 'employment', as it affects the distinction between 'workers' and 'independent contractors', is effectively expanded by the adoption of

⁴² *Economic Strategy for Victoria*, Statement No. 5, p. 114.

⁴³ Accident Compensation Act s.32.

⁴⁴ Accident Compensation Act s.39(1).

⁴⁵ Accident Compensation Act s.52(1).

⁴⁶ Accident Compensation Act ss.53 and 55(2) and (3).

⁴⁷ Accident Compensation Act s.54.

⁴⁸ Accident Compensation Act s.55(1).

⁴⁹ Accident Compensation Act s.68(1).

⁵⁰ Accident Compensation Act s.5(1).

⁵¹ Accident Compensation Act s.14(1).

⁵² Accident Compensation Act s.5(8).

⁵³ Accident Compensation Act s.12.

Section 3C of the Pay-Roll Tax Act 1971 (Vic.).⁵⁴ A person who might otherwise have been considered an 'independent contractor' working under a contract for services may be deemed, in certain circumstances, to be working under a 'relevant contract' whereby an employment situation will be said to exist. A 'relevant contract' is broadly defined, extending *prima facie* to any situation where a person supplies services, has supplied to him or her services, or gives out goods in the course of a business carried on by that person.⁵⁵ There are a number of exemptions from this *prima facie* classification, however, with perhaps the most notable being situations where the services are of a kind ordinarily required for less than 180 days in a financial year,⁵⁶ the services are provided by one person for a period not exceeding 90 days aggregate in a financial year,⁵⁷ or the services are of a kind rendered by a person who ordinarily renders services of that kind to the public generally.⁵⁸

With respect to the concept of an 'injury', the scope of the Act is widened in that it is no longer a requirement that a disease contracted by a worker or a recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing injury or disease, be affected by employment 'to a recognisable degree'.⁵⁹ Obviously, therefore, only the most tenuous of links will now be required between an injury or disease and employment in order to qualify for coverage by the Act.

It should be observed that the provisions in the Workers Compensation Act relating to deliberately self-inflicted injuries, injuries attributable to serious and wilful misconduct, journey accidents and injuries arising outside Victoria are essentially restated in the Accident Compensation Act.⁶⁰

(d) Types of Compensation

As with the Workers Compensation Act, compensation is payable under the Accident Compensation Act where a worker's death has been caused by employment, where there is total or partial incapacity arising out of employment, where a worker is suffering a permanent disability to a specified part of the body or where medical and the like expenses have accrued, subject, of course, to the appropriate criteria of eligibility being met.

The provision of death benefits remains essentially unchanged with the primary entitlement being increased slightly to \$61,750.00 and children's benefits ranging from \$3,400.00 to \$15,060.00.⁶¹

⁵⁴ Accident Compensation Act s.9.

⁵⁵ Accident Compensation Act s.9(1); cf. Pay-Roll Tax Act 1971 (Vic.) s.3C(1).

⁵⁶ Accident Compensation Act s.9(1)(e)(ii); cf. Pay-Roll Tax Act s.3C(1)(e)(ii).

⁵⁷ Accident Compensation Act s.9(1)(e)(iii); cf. Pay-Roll Tax Act s.3C(1)(e)(iii).

⁵⁸ Accident Compensation Act s.9(1)(e)(v); cf. Pay-Roll Tax Act s.3C(1)(e)(v).

⁵⁹ Accident Compensation Act s.5(1).

⁶⁰ See Accident Compensation Act ss.82, 83, and 84. Note, however, that s.83(2)(h), relating to journey accidents, is broader in operation than s.8(2) of the Workers Compensation Act.

⁶¹ Accident Compensation Act s.92. The only significant innovation in this respect is that payments previously made to the deceased during his or her lifetime are not deductible from the lump sum as was the case under the Workers Compensation Act.

The method of calculating a totally incapacitated worker's entitlement to weekly payments is, however, significantly altered. The applicable rate is no longer a fixed statutory sum but instead the worker is entitled to 80% of 'pre-injury average weekly earnings' or \$400.00, whichever is less.⁶² Furthermore, in order to protect low income workers, the Act establishes a minimum weekly payment of \$196.00 for a worker without dependants, \$251.00 per week for a worker with one dependant and, where a worker has more than one dependant, the minimum entitlement is \$196.00 plus \$55.00 for the first dependant and \$18.00 for each other dependant.⁶³ The only qualification on the minimum payment is that the total payment is not to exceed the worker's pre-injury earnings.⁶⁴ Payments are not subject to a statutory maximum or 'primary limit' in respect of the total amount payable over a period of time although the Act provides that benefits are to cease when the worker becomes eligible to receive an age pension from the Commonwealth or when he or she reaches the 'normal retiring age' in his or her industry or occupation.⁶⁵

The procedure for calculating the 'pre-injury average weekly earnings' will doubtless be a source of constant dispute. Essentially, the calculations are based on a worker's average earnings during the 12 months preceding the injury, having reference to the ordinary time rate of pay as opposed to any overtime benefits the worker may have been accustomed to receiving.⁶⁶ It is, however, necessary for the Act to make further provisions in relation to a situation where an 'ordinary time rate' or 'normal number of hours' are not fixed,⁶⁷ where a worker has had more than one employer,⁶⁸ where a worker was employed under an age-related award,⁶⁹ where the worker was a student⁷⁰ and where a worker was not employed full time when the injury was sustained but had been 'predominantly a full time worker' beforehand.⁷¹

A partially incapacitated worker is entitled to compensation so long as there is an actual or deemed drop in income.⁷² If the worker is employed but suffering a drop in earnings, the entitlement to compensation is calculated on the basis of 85% of the difference between the current weekly earnings and the 'pre-injury average weekly earnings' or an amount of \$400.00, whichever is less.⁷³ If a worker is not employed but acknowledges or is found by the Tribunal to be partially incapacitated only, the compensation entitlement is 80% of the 'pre-injury average weekly earnings' or \$400.00, whichever is the less.⁷⁴

⁶² Accident Compensation Act s.93(4).

⁶³ Accident Compensation Act s.93(5).

⁶⁴ Accident Compensation Act s. 93(6). It would seem the legislation permits payments in these circumstances to exceed \$400.00 per week.

⁶⁵ Accident Compensation Act s.93(3).

⁶⁶ Accident Compensation Act s.95(1).

⁶⁷ Accident Compensation Act s.95(3).

⁶⁸ *Ibid.*

⁶⁹ Accident Compensation Act s.95(4).

⁷⁰ Accident Compensation Act s.95(7).

⁷¹ Accident Compensation Act s.93(7).

⁷² Accident Compensation Act s.94(1).

⁷³ Accident Compensation Act s.94(4).

⁷⁴ Accident Compensation Act s.94(5).

Benefits payable pursuant to the Table of Maims for permanent disability are not dissimilar to those payable under the Workers Compensation Act. An important innovation in this respect is that the benefits are no longer a substitute for weekly payments but are in addition to any other compensation payable, either beforehand or afterwards.⁷⁵ Probably the most substantial innovation, however, is that the categories of injury are extended to quadriplegia, paraplegia, impairment of the back, impairment of the neck and impairment of the pelvis. These injuries are not specified in the Table appended to Section 11(1) of the Workers Compensation Act.

(e) Procedure

An employer receiving a claim for compensation is required to forward it to the Commission within 5 days.⁷⁶ If liability is in dispute, the Commission must decide within 21 days of the original date upon which the employer received the claim whether liability will remain in dispute and if so, it must within 2 working days of making that decision refer the claim to the Tribunal and within 5 days advise the worker of the reasons for the dispute.⁷⁷ If, on the other hand, the Commission decides to accept liability, it must advise the employer and the worker and direct the employer to pay weekly compensation.⁷⁸

In respect of the initial 5 days of total or partial incapacity, the employer has the option of accepting liability of its own initiative. Where the claim extends beyond this period, however, it is for the Commission alone to decide whether liability is to be accepted or disputed.⁷⁹

It should be noted that where the total amount of leviable remuneration paid or payable by an employer during the financial year exceeds \$10,000.00, then that employer will be responsible for making weekly payments for total or partial incapacity in respect of the first 5 working days of that incapacity and for payment of the first \$250.00 of the reasonable costs of medical and like services.⁸⁰

In all claims where liability is denied, failure by the Commission to refer a claim to the Tribunal within the 21 day period referred to above will result in a deemed acceptance of the claim.⁸¹ Otherwise, however, the claim is subject to a 'genuine dispute' procedure similar to that which applies to Workers Compensation Act claims and which are heard initially by a conciliation division of the Tribunal. Once again, a worker may apply to the Tribunal for a review in the event of a conciliator finding that a genuine dispute does exist and that weekly payments are not to be commenced.⁸²

⁷⁵ Accident Compensation Act s.98(1).

⁷⁶ Accident Compensation Act s.108(1).

⁷⁷ Accident Compensation Act s.109(2)(b).

⁷⁸ Accident Compensation Act s.109(2)(a).

⁷⁹ See Accident Compensation Act s.109.

⁸⁰ Accident Compensation Act s.125.

⁸¹ Accident Compensation Act s.111(1).

⁸² Accident Compensation Act s.109(9).

Once in receipt of weekly payments of compensation, the right of an employer to seek a termination or diminution of those payments, or of either party to seek a redemption, is significantly different from the procedure applicable under the Workers Compensation Act. The employer no longer has the right to issue terminating or diminishing certificates. Payments may be ceased if the worker fails to supply a certificate of incapacity⁸³ within 28 days of a request by the Commission, but otherwise payments may only be reviewed by application to the Tribunal where it is alleged a worker has unreasonably refused an offer of suitable employment,⁸⁴ payments have been fraudulently obtained or the incapacity is no longer in part related to an injury that arose in the course of employment.⁸⁵

An employer no longer has the right to apply for a redemption of its future liability. A worker may apply for redemption, but only to the extent of 30% of weekly payments for a period of up to 5 years if he or she is 55 years of age or over and has an incapacity which is assessed as being permanent.⁸⁶ A redemption of this nature is also available to younger workers for the purpose of an income producing project approved by the Victorian Accident Rehabilitation Council⁸⁷ and a full redemption is available to a partially incapacitated worker receiving weekly payments not exceeding 5% of the maximum entitlement.⁸⁸

(f) Common Law Claims

Prior to the enactment of the Accident Compensation Act, concern had been expressed in some quarters as to the desirability of 'once and for all' lump sum awards. It was considered that such lump sums often proved to be inadequate and, more seriously, the expectation of a large award could have a deleterious effect upon the rehabilitation of injured workers, particularly those who developed a genuine functional overlay during the long wait preceding trial.⁸⁹ As a result of this concern, the right of workers to seek a redemption of weekly payments of compensation was restricted, as discussed above, and so too was the extent to which a worker could pursue common law damages against a negligent employer.

The principles of common law as they apply to negligent employers are discussed later but mention should be made at this stage of the effect of the Accident Compensation Act on such claims. With respect to common law, the Act effectively retains the right of a worker to sue for general damages

⁸³ Accident Compensation Act s.113. The certificate may be issued by a medical practitioner, a chiropractor, an osteopath or a rehabilitation councillor.

⁸⁴ Accident Compensation Act s.112(1).

⁸⁵ Accident Compensation Act s.114(1).

⁸⁶ Accident Compensation Act s.115(1).

⁸⁷ Accident Compensation Act s.115(2).

⁸⁸ Accident Compensation Act s.115(3).

⁸⁹ *Economic Strategy for Victoria*, Statement No. 5, p.65; cf. Report of the Committee of Enquiry into the Victorian Workers Compensation System, 9.3.5.

for pain and suffering and loss of enjoyment of life but the right to sue for pecuniary loss is limited to the following situations:⁹⁰

- (i) in proceedings brought under Part III of the Wrongs Act 1958;
- (ii) in proceedings against a person entitled to indemnity under a contract of insurance complying with the requirements of Division 1 of Part V of the Motor Car Act 1958; and
- (iii) in proceedings involving a 'journey accident' where the employee's place of employment is fixed and the injury is caused by the negligence of a third party.

It should be noted that where damages have been recovered for pecuniary loss, the worker is no longer entitled to receive compensation in respect of the injury apart from a claim pursuant to the Table of Maims.⁹¹ Where damages are recovered for non-pecuniary loss, the worker is no longer entitled to a payment pursuant to the Table of Maims but remains entitled to receive compensation for total or partial incapacity and attendant medical and like expenses and, where death is involved, the worker's dependants are entitled to the death benefits provided by the Act.⁹²

It is not clear, however, whether the reverse situation applies and a worker who has obtained payment under the Table of Maims is precluded from seeking common law damages for non-pecuniary loss.^{92a}

(g) Self-Insurance

Government policy called for the reintroduction of the option of self-insurance, on the basis that this would provide a 'continuing spur to the Commission' to 'achieve and maintain best practice'.⁹³ There were some misgivings expressed, however, by those who believed that the right of self-insurance was inconsistent with one of the primary goals of the new scheme which was to maximise security being offered to workers. Accordingly it was decided that the right of self-insurance should be limited only to those employers which could satisfy the strictest of criteria.

In accordance with this policy, the Act provides that an employer may apply for a licence to self-insure only if it employs no less than 1,000 workers in Victoria and the value of its assets exceeds the value of its liabilities by at least \$200,000,000.00.⁹⁴ Having satisfied these criteria, the Act further lists a number of factors which will be taken into account when consideration is given to an application, including the administrative capabilities of the employer, the employer's accident rate and safety conditions generally, and the result, if any, of a ballot of workers employed by the applicant.⁹⁵ Self-

⁹⁰ Accident Compensation Act s.135(1).

⁹¹ Accident Compensation Act s.135(3).

⁹² Accident Compensation Act s.135(4).

^{92a} See Curtis and Hughes, *Accident Compensation Handbook (Victoria)* (1986), 85.

⁹³ *Economic Strategy for Victoria*, Statement No. 5, p.101.

⁹⁴ Accident Compensation Act s.141(2).

⁹⁵ Accident Compensation Act s.142(2).

insurance licences are granted initially for 3 years and renewals may be for 4 years.⁹⁶

(h) Rehabilitation

Rehabilitation of injured workers was a key feature of the Government's WorkCare program and was intended to be given a 'new emphasis'⁹⁷ by the Accident Compensation Act. It was proposed by the Government that a network of occupational rehabilitation facilities be established throughout the State under the supervision of a central authority.

In accordance with this policy, the Act establishes the Victorian Accident Rehabilitation Council⁹⁸ which has the responsibility to develop policies, standards and guidelines for the provision of occupational and social rehabilitation services for the purpose of rehabilitating injured workers.⁹⁹ The Council has the more general objectives of promoting research into occupational and social rehabilitation and promoting public awareness of such matters.¹

(i) Accident Compensation Levy

From a political point of view, it was essential that the Government be able to establish a simple and relatively cheap levy procedure to accompany the improved benefits which were granted to workers under the new accident compensation system. In general terms, the Act provides in this regard that each employer will be placed into one of seven categories, depending on the perceived risk rate in its industry. The seven categories attract a levy rate ranging from 0.57% to 3.8% per annum of 'leviable remuneration' whilst special provisions apply for bonus and penalty rates and a 'dangerous industry rate'.

It is not proposed to deal with the levy provisions of the Act in great detail in this paper. Some points nevertheless need to be made.

All employers, unless exempt, are required to pay a levy based on remuneration paid to workers engaged in operations at each establishment of the employer. 'Remuneration' is defined in the same way as 'wages' under the Pay-Roll Tax Act² and 'establishment' is defined in much detail³ in an attempt to prevent contrived levy avoidance schemes. The Act also implements the provisions of the Pay-Roll Tax Act in defining 'related corporations'⁴ and employer 'groups',⁵ again with the intention of preventing avoidance schemes

⁹⁶ Accident Compensation Act s.142(4).

⁹⁷ *Economic Strategy for Victoria*, Statement No. 5, p.3.

⁹⁸ Accident Compensation Act s.157.

⁹⁹ Accident Compensation Act s.159.

¹ *Ibid.*

² Accident Compensation Act s.5(1); *cf.* Pay-Roll Tax Act s.3.

³ Accident Compensation Act s.181.

⁴ Accident Compensation Act s.183; *cf.* Pay-Roll Tax Act s.3(5).

⁵ Accident Compensation Act s.196; *cf.* Pay-Roll Tax Act s.9A.

designed to split income or isolate dangerous aspects of a business.

As discussed above, the calculation of an employer's levy is in the form of a percentage levy of all remuneration. However, where remuneration did not exceed \$5,000.00 during the financial year ending 30th June, 1986 no levy is payable.⁶ The relevant rate for each industry is set out in the Accident Compensation Regulations⁷ and the Act provides that whilst the appropriate rate for each industry is to be reviewed every 12 months,⁸ the seven rate levels are not to be increased prior to the 1st September, 1990.⁹

The industry to which an establishment is classified is dependent upon the 'predominant activity' carried on at each establishment.¹⁰ The Act therefore defines 'predominant activity' as the activity which 'contributes or is likely to contribute more than any other activity to the value of goods or services or goods or services produced or provided by the employer from operations carried on in the establishment'¹¹ This has already proved to be an area of potential conflict, with employers, understandably, seeking to establish wherever possible that the more dangerous aspects of their business do not constitute the 'predominant activity'.

Consistent with Government policy, the Act provides that the Commission may declare certain industries 'dangerous industries' whereby they become subject to a special rate not to exceed 20%.¹² The Commission may also determine that particular employers are to be levied at a special lower or higher rate where the incidence of injuries is significantly lower or higher than the experience in corresponding establishments in Victoria.¹³ The bonus system extends to employers who provide continued employment or re-employment to injured workers¹⁴ and, conversely, the penalty system may be extended to employers refusing to re-engage injured workers.¹⁵

Finally, it should be noted the Act contains detailed provisions in relation to the registration of employers, the collection and payment of the levy and the lodging of objections and appeals. These provisions correspond, wherever possible, with the Pay-Roll Tax Act to enable simultaneous assessment and collection of both the levy and pay-roll tax in Victoria.

D. GENERAL PRINCIPLES OF COMMON LAW

An entitlement to compensation arises under either the Workers Compensation Act or the Accident Compensation Act irrespective, in most cases, of the question of fault. If the injury is caused by the negligence of

⁶ Accident Compensation Act s.180(1)(3)(a). This exemption is subject to annual indexation.

⁷ Regulation 32 (referring to schedule 6).

⁸ Accident Compensation Act s.187(4).

⁹ Accident Compensation Act s.187(5).

¹⁰ Accident Compensation Act s.187(3).

¹¹ Accident Compensation Act s.182(1).

¹² Accident Compensation Act s.188(1).

¹³ Accident Compensation Act ss.189(1) and (2).

¹⁴ Accident Compensation Act s.189(6).

¹⁵ Accident Compensation Act s.189(7).

the employer, the worker may, in addition, proceed against the employer at common law for damages. The nature of such a claim is, however, as foreshadowed previously, dependent upon whether the injury was sustained before or after 4.00 p.m. on 31st August, 1985. It is proposed to discuss here briefly the general principles of common law as they relate to injuries caused by the negligence of an employer, and to examine the effect of the Accident Compensation Act on the nature of such claims.

(a) *Liability*

It is clearly established that an employer owes a general duty of care to an employee and where an employee suffers injury as a result of a breach of that duty, action may be taken against the employer for damages. The employer's duty may be expressed in general terms as a duty to take reasonable care for the safety of the employee in all the circumstances of the case.¹⁶ This duty applies to all areas of the employment but as a matter of convenience it is often divided into the particular categories of safe premises, safe equipment and a safe system of work.¹⁷ An employer does not have an absolute obligation to devise a system of work free of all risk but rather it has an obligation to take reasonable steps in the circumstances.¹⁸ Recent decisions of the High Court of Australia have tended to place a strong obligation on employers to foresee any possible risk of injury to a worker.¹⁹

In addition to its personal liability, an employer may be liable for an injury to one employee arising from the negligence of another. The aspect of this liability which most often causes difficulties is whether the negligent employee was at the relevant time acting within the scope of his or her employment and this may extend to situations where the act of the employee which constitutes the negligence has been forbidden by the employer²⁰ or where the act of the employee has not been done for the benefit of the employer.²¹

Common law liability may also arise out of the breach of a statutory duty. There are many statutes and regulations which impose particular duties on employers. A breach of a provision prescribing a specific precaution for the safety of others may result in a common law action against the employer.²²

An employer may be able to evoke the defence of contributory negligence where an injured employee has failed to take reasonable care for his or her own safety and this failure, together with the negligence of the employer, has contributed to the accident. Damages otherwise recoverable may be reduced in these circumstances to such an extent as the court thinks just and equitable, having regard to the plaintiff's share in the responsibility for the damage. The

¹⁶ *Paris v. Stepney Borough Council* [1951] A.C. 367.

¹⁷ *Wilson v. Tyneside Window Cleaning Co.* [1958] 2 Q.B. 110.

¹⁸ *General Cleaning Contractors Ltd. v. Christmas* [1953] A.C. 180.

¹⁹ *Kondis v. State Transport Authority* (1984) 58 A.L.J.R. 531; *McClellan v. Tedman & Brambles Holding Limited* (1984) 58 A.L.J.R. 541.

²⁰ *Limpus v. London General Omnibus Co.* (1862) 1 H.C. 526.

²¹ *Uxbridge Permanent Building Society v. Pickhard* [1939] 2 K.B. 248.

²² *Connor v. S.P. Bray Limited* (1936) 56 C.L.R. 464.

burden of establishing contributory negligence rests with the employer in these circumstances and it must be shown that the worker's conduct involved a foreseeable risk of self injury, that there was a reasonably practicable alternative course which would have avoided that risk and that there is a causative connection between the conduct of the worker and the injury.

It should be noted that contributory negligence is not available as a defence in Victoria to actions brought by dependants of a deceased worker pursuant to the Wrongs Act.²³

(b) Damages

The principle on which the law of damages is based is that a person who has suffered injury or loss should, so far as possible, obtain a sum of money which will put him or her in the same position as he or she would have been in had the injury or loss not occurred.²⁴ Damages awarded for personal injuries are expressed as a lump sum and in arriving at that figure, regard has traditionally been had to the following heads of damage:

- (i) Special damages;
- (ii) Future economic loss;
- (iii) Pain and suffering and loss of enjoyment of life.

As discussed previously, the Accident Compensation Act largely precludes an action against an employer for (i) and (ii) above, thereby restricting the calculation of damages to pain and suffering and loss of enjoyment of life where the injury is sustained after 4.00 p.m. on 31st August, 1985.

'Special damages' refers to pecuniary loss suffered by the plaintiff up to the date of trial if this is capable of precise calculation. This normally consists of a claim for lost income between the date of the accident and the date of the trial, calculated on a net basis,²⁵ and expenses incurred for medical and similar treatment. It should be added that where pecuniary loss suffered by the plaintiff up to the date of trial is not capable of precise calculation, an appropriate allowance will be included in the quantification of general damages.

'Future economic loss' embraces the difference between the worker's earning capacity as a result of the injury and his or her earning capacity as it would have been had the injury not been suffered.²⁶ The calculation involves not only a degree of speculation as to what income the plaintiff would have earned in the future but also consideration of the worker's likely retiring age, contingencies of life such as illness or unemployment and the advantage to the plaintiff of investing a lump sum and earning interest. In the latter regard

²³ *Wrongs (Dependants) Act 1982* (Vic.) s.26 (4).

²⁴ *Livingstone v. Rawyards Coal Co.* (1880) 5 A.C. 25 (HL). For a comprehensive discussion on damages, see Luntz, *Assessment of Damages for Personal Injury and Death* (2nd ed. 1983).

²⁵ Damages for lost earning capacity will be reduced to take into account income tax which the plaintiff would have paid in respect of those earnings: *Cullen v. Trappell* (1980) 29 A.L.R. 1. See Luntz, *op. cit.* 263-270.

²⁶ *Wade v. Allsopp* (1976) 10 A.L.R. 353.

the appropriate discount rate has been held by the High Court to be 3% with no further allowance to be made for the possible effects of either inflation or tax.²⁷

The calculation of damages for pain and suffering and loss of enjoyment of life is, understandably, even more vague. Clearly it is not possible to establish a formula for the calculation in monetary terms of the effect of a particular injury on a worker's enjoyment of life. A calculation for the same type of injury may vary considerably from case to case, depending upon the effect on the individual. There does, however, appear to be a degree of consistency flowing from case to case where certain injuries are concerned.²⁸ Whether this consistency will continue, however, where a judge or jury is limited by the Accident Compensation Act to a consideration of damages under this head only, remains to be seen. There could be a tendency, consciously or subconsciously, for a more generous allowance to be made in certain instances and inconsistency could certainly occur during the interim period when courts are dealing with some cases in which pecuniary loss is still recoverable and others in which only non-pecuniary loss is recoverable.

E. INJURIES BY GRADUAL PROCESS

Complications will inevitably arise in situations where an injury has been sustained partly before and partly after 4.00 p.m. on 31st August, 1985.

The Act accordingly provides that where a claim for compensation is made 'in respect of an injury which occurred by way of gradual process over time', the claim need only be lodged against the most recent employer²⁹ but the Commission has the right to recover an appropriate proportion of compensation payments from the employer or workers' compensation insurer responsible prior to 31st August, 1985. If an agreement cannot be reached between the relevant employers or insurers and the Commission, the Tribunal may determine the issue of contribution.³⁰

Where a worker claims that an injury by gradual process was caused by an employer's negligence, an unusual situation will exist. The entitlement to damages, other than for non-pecuniary loss, will cease to exist in relation to that part of the injury occurring after 4.00 p.m. on 31st August, 1985. The situation will therefore arise whereby a worker will be entitled to claim damages for pecuniary loss in relation to that proportion of the injury sustained prior to 4.00 p.m. on 31st August, 1985 but only damages for pain and suffering and loss of enjoyment of life in relation to the injury after that time. This could well lead to a conflict of interest between the Commission and the insurer of the employer prior to 31st August, 1985, the latter no doubt arguing that the real damage suffered by the worker occurred after 4.00 p.m. on 31st

²⁷ *Todorovic v. Waller* (1981) 37 A.L.R. 481 and *Hankin v. Jetson* (1981) 37 A.L.R. 481.

²⁸ See *Hirsch v. Bennett* [1969] S.A.S.R. 493.

²⁹ Accident Compensation Act ss.129(1) and (2).

³⁰ Accident Compensation Act s.129(3).

August, 1985 and that any claim for future economic loss for injury prior to that date should be severely limited. In order to maximise damages, plaintiff workers are likely to be anxious to take the opposite approach.

F. CONCLUSION

The Accident Compensation Act 1985 is a remarkably radical piece of legislation. It was enacted in a climate of political and legal controversy, emanating mainly from the insurance industry and the legal profession which both envisaged lost revenue through reduced involvement in the scheme. There can be no doubt that the objectives of the Act — to provide improved benefits and rehabilitative opportunities to workers at a reduced cost to employers — are laudable and presumably welcomed by most sections of the community. There can be no doubting that the Act has succeeded in improving the position of the injured worker, despite the dismay expressed in some quarters over the limitation of redemption and common law rights. The true indicator of the success of the scheme, therefore, will be the ability of the Government to maintain its commitment not to increase the levy rates until 1990. If both these objectives can be met, the Accident Compensation Act 1985 will be one of the most significant pieces of legislative reform in Victoria's history.